NO. 41083-4-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

BRIAN BEDILION,

Defendant-Appellant.

APPELLANT'S OPENING BRIEF

Appeal from the Pierce County Superior Court
The Hon. Brian Tollefson, Superior Court Judge
No. 07-1-00977-1
No. 08-1-01290-7
No. 09-1-02296-0

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

STATUTES AND COURT RULES

I. ASSIGNMENTS OF ERROR

1. Brian Bedilion assigns error to the entry of the judgments and sentences in these three cases.

2. There was insufficient evidence to support the jury's verdicts on counts II (second degree theft), IX (forgery) and XI (forgery) in 08-1-01290-7 ("the 2008 case").

3. There was insufficient evidence to support the jury's special verdicts on counts IV, IX and XI in the 2008 case.

4. The "multiple victims" / "multiple incidents" aggravator does not apply when the defendant is already charged with a separate count for each victim and/or incident.

5. The trial court erred by instructing the jury that it must be unanimous in order to answer "no" to the questions posed in the special verdict forms.

6. The guilty pleas in 07-1-00977-1 ("the 2007 case") and 09-1-02296-0 ("the 2009 case") were involuntary.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there sufficient evidence to support the jury's verdicts on counts IX (forgery) and XI (forgery) in the 2008 case,

where there was no evidence that the forged instrument in either count was put off as true in the State of Washington? (Assignment of Error No. 2)

2. If there was insufficient evidence to support the jury's verdicts on the forgeries charged in counts IX and XI, must the second degree theft conviction on count II also be vacated where the only remaining forgery for which there was sufficient evidence (count IV) involved a loss ($138.85) of less than $250? (Assignment of Error No. 2)

3. Was there sufficient evidence to support the jury's special verdicts finding that counts IV, IX and XI in the 2008 case each constituted a "major economic offense" where there was only a single victim and incident associated with each count? (Assignment of Error No. 3)

4. Can the prosecutor seek—and the jury find—the existence of the "multiple victims" / "multiple incidents" aggravator when the defendant is already charged with a separate count for each victim and/or incident? (Assignment of Error No. 4)

5. Did the trial court err by instructing the jury that it must be unanimous in order to answer "no" to the questions posed in the special verdict forms? (Assignment of Error No. 5)

6. Was the instructional error harmless beyond a reasonable doubt? (Assignment of Error No. 5)

7. Where the guilty pleas in the 2007 and 2009 cases were part of an indivisible plea agreement which arose directly from the jury verdicts in the 2008 case, does a disturbance of the jury's verdicts render the guilty pleas involuntary? (Assignment of Error No. 6)

III. STATEMENT OF THE CASE

Procedural Overview

Brian Bedilion was charged in Pierce County Superior Court with multiple property crimes under three separate cause numbers: 07-1-00977-1 ("the 2007 case"); 08-1-01290-7 ("the 2008 case"); and 09-1-02296-0 ("the 2009 case").

Bedilion proceeded to trial on the 2008 case. Although the jury acquitted him on six counts and hung on two others, it convicted Bedilion of one count of second degree identity theft (count I), one

count of second degree theft (count II), and three counts of forgery (counts IV, IX and XI). CP 186-98. The jury also answered "yes" on three special verdict forms for the forgery counts. Each of the special verdict forms asked: "Was the crime a major economic offense or series of offenses?" CP 202, 207, 209.

Several days after the verdicts, the parties appeared in court and announced that a plea deal had been struck in the remaining two cases—the 2007 case and the 2009 case. 8 RP 698-99.[1] The State informed the trial court that the parties had agreed to an exceptional sentence "based on the fact that this case as [sic] a major economic offense as found by the jury in Counts 4, 9 and 11." 8 RP 699.

Bedilion then entered pleas of guilty in the 2007 case to one count of first degree identity theft, one count of first degree theft, three counts of forgery, and one count of bail jumping. CP 78-88. In the 2009 case, Bedilion pled guilty to one count of residential

[1] "RP" denotes the verbatim report of proceedings. The report of proceedings appear in eight numbered volumes in which the pages are numbered sequentially from RP 1 to RP 725. Citations to these volumes will include both the volume number and the page number. On one day of the trial—September 15, 2009—the volume was not numbered. The transcript for that day has its own pagination and will be cited as RP [page number] (9/15/09).

burglary. CP 317-25. Bedilion thus faced sentencing on 12 felony counts—five in the 2008 case on which he had proceeded to trial, six in the 2007 case, and one in the 2009 case. The standard ranges for these 11 counts broke down as follows:

CASE	CRIME	STANDARD RANGE
2007	Identity Theft 1°	63-84 months
2007	Forgery	22-29 months
2007	Theft 1°	43-57 months
2007	Bail Jumping	51-60 months
2007	Forgery	22-29 months
2007	Forgery	22-29 months
2008	Identity Theft 2°	43-57 months
2008	Theft 2°	22-29 months
2008	Forgery	22-29 months
2008	Forgery	22-29 months
2008	Forgery	22-29 months
2009	Residential Burglary	63-84 months

CP 92-105, 291-304, 329-41. Because of the presumption of concurrent sentences, in the absence of an exceptional sentence Bedilion faced a total of 63-84 months in prison on the three cases.

Instead, the parties entered into a stipulation whereby Bedilion would receive a standard range sentence on each case, but that the sentences on the three cases would run consecutively, for a total exceptional sentence of 13 years. CP 284-87. Accordingly, the trial court sentenced Bedilion to 63 months on the 2007 case, 30

months on the 2008 case[2], and 63 months on the 2009 case, to be served consecutively, for a total of 156 months (13 years) in prison. CP 92-105, 291-304, 329-41.

Bedilion appealed the judgments and sentences in all three cases. CP 109-10, 307-08, 346-47.

The Evidence at Trial in the 2008 Case[3]

Jostein Tvedt is a painting contractor doing business under the name "Painter's West." 2 RP 37, 42. According to Tvedt, Brian Bedilion worked for Painter's West for approximately half a day in October 2006. 2 RP 40-41. Tvedt never gave Bedilion or anyone else permission to write checks on the Painter's West account. 2 RP 54.

On October 16, 2006, a check numbered 10520 in the amount of $138.85 was presented to Alisha Peterson, a cashier at Thunderbird Trading Post. The account number on the check was a

[2] The 30 months imposed in the 2008 case was actually below the low end of the standard range, which for that case was 43 months. This was apparently done to achieve the stipulated goal of imposing a total of 13 years in prison.

[3] Bedilion summarizes the evidence pertaining only to the counts on which he was convicted at trial.

valid account number belonging to Painter's West, but the names imprinted on the check were B&B Landscaping and Brian Bedilion. RP 13 (9/15/09). Peterson later identified Bedilion from a photo montage as the person who had presented the check. 2 RP 123-24, 191. According to Peterson, Bedilion was a regular customer who came into the store two or three times a week. 2 RP 117-18. Peterson also identified Bedilion in court. 2 RP 124.

On October 20, 2006, a check numbered 10534 in the amount of $197.86 was presented to a Big 5 store at an unidentified location. Again, the account number on the check belonged to Painter's West, but the names imprinted on the check were B&B Landscaping and Brian Bedilion. RP 37-38 (9/15/09). No one from Big 5 testified at trial.

On October 22, 2006, a check numbered 10543 in the amount of $176.76 was presented to World Market at an unidentified location. Once again, the account number on the check belonged to Painter's West, but the names imprinted on the check were B&B Landscaping and Brian Bedilion. RP 39 (9/15/09). No one from World Market testified at trial.

Bedilion testified at trial and denied signing any of the checks. 5 RP 474-77.

Special Verdict Jury Instructions

Regarding how the jury should approach the aggravating factor, Jury Instruction No. 43 stated:

> To find that this crime is a major economic offense, the following factor must be proved beyond a reasonable doubt:
>
> The crime involved multiple victims or multiple incidents per victim.
>
> If you find from the evidence that the factor has been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form.

CP 278.

Instruction No. 43 contained no language regarding unanimity. The only such language appeared in Jury Instruction No. 45, which stated in relevant part: "Because this is a criminal case, each of you must agree for you to return a verdict." CP 281. Nowhere was the jury instructed that it need not be unanimous in order to answer "no" on the special verdict form.

IV. ARGUMENT

There Was Insufficient Evidence to Support the Jury's Verdicts on Counts II (Second Degree Theft), IX (Forgery) and XI (Forgery) in the 2008 Case.

A conviction based on insufficient evidence offends due process. Evidence is sufficient if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

Counts IX and XI

Jury Instruction No. 31 required that the jury find beyond a reasonable doubt that the forgery alleged to have occurred at the Big 5 store (count IX) occurred in the State of Washington. CP 266. Similarly, Jury Instruction No. 33 required that the jury find beyond a reasonable doubt that the forgery alleged to have occurred at the World Market (count XI) also occurred in the State of Washington. CP 268.

No witness from either store testified at trial. Even viewing the evidence in the light most favorable to the State, there is simply

no way for the jury to have concluded beyond a reasonable doubt that the two checks at issue were presented at Big 5 and World Market stores located in Washington. Both stores are well-known national chains. Big 5 has stores in 12 states. *See* http://big5sportinggoods.shoplocal.com/big5/default.aspx?action=storelocationzipentry&storeid=2503823. Likewise, World Market has over 250 stores nationwide. *See* http://worldmarketcorp.com/about-us/.

The State did not bother to bring in a witness from either store. It is the State which must bear the burden of that decision. This Court should reverse the convictions on counts IX and XI and dismiss those counts. The Court should remand for re-sentencing on the remaining counts.

Count II

Bedilion's conviction for second degree theft was not based on a single event. Rather, it was based on the aggregated amounts of the forged checks. CP 273 (Jury Instruction No. 31). If the Court vacates the convictions in counts IX and XI, the only remaining forgery for which there is sufficient evidence is count IV. The

amount of the check presented in count IV was $138.85. RP 13 (9/15/09). Because this amount is less than the $250 required for the jury to return a guilty verdict on count II, this Court should vacate the conviction in count II as well.

There Was Insufficient Evidence to Support the Jury's Special Verdicts on Counts IV, IX and XI in the 2008 Case. Even if the Evidence Were Sufficient, the "Multiple Victims" / "Multiple Incidents" Aggravator Does Not Apply When the Defendant Is Already Charged With a Separate Count for Each Victim and/or Incident.

As noted above, a conviction based on insufficient evidence offends due process. Evidence is sufficient if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original).

Each of the three special interrogatories to which the jury answered "yes" was worded as follows:

> We, the jury, having found the defendant guilty of Forgery in Count [ ] as defined in these instructions return a special verdict by answering as follows:
>
> Was ***the crime*** a major economic offense or series of offenses?

CP 202 (count IV), 207 (count IX), 209 (count XI) (emphasis supplied). Jury Instruction No. 43 stated in relevant part:

> To find that ***this crime*** is a major economic offense, the following factor must be proved beyond a reasonable doubt:
>
> ***The crime*** involved multiple victims or multiple incidents per victim.

CP 278 (emphasis supplied). Thus, in order to answer "yes" to any of the special interrogatories the jury had to be convinced beyond a reasonable doubt that *the particular count* for which the question was posed involved either multiple victims or multiple incidents per victim. No rational trier of fact could find this to be the case for any of the three forgeries.

In convicting Bedilion of the forgery alleged in count IV, the jury found that on October 14, 2006, Bedilion knowingly passed a single forged check—number 10520—made payable to Thunderbird. CP 261. Similarly, count IX also involved a single check—number 10534—made payable to Big 5 on October 21, 2006. CP 266. Lastly, count XI also involved a single check—number 10543—made payable to World Market on October 22, 2006. In other words, each of the three counts involved a single incident, with a

single check, on a single date, involving a single victim. Given the manner in which the jury was instructed, *no* rational trier of fact could find beyond a reasonable doubt that any of the three forgeries involved multiple victims or multiple incidents per victim.

Moreover, as a matter of law the "multiple victims" / "multiple incidents" aggravator cannot be employed where the defendant is already charged with a separate count for each victim and/or incident. *State v. Pittman*, 54 Wash.App. 58, 62- 63, 772 P.2d 516 (1989):

> In *State v. Fisher,* 108 Wash.2d 419, 739 P.2d 683 (1987), the Supreme Court considered application of a prior codification of RCW 9.94A. 390(2)(c)(i)[4] and held that when the multiplicity of incidents has been accounted for in computing a defendant's offender score and presumptive range, it cannot also be used to justify an exceptional sentence. 108 Wash.2d at 426, 739 P.2d 683. In other words, this factor may only be used when "the conduct forming the basis of the charge creates multiple victims," *State v. Davis,* 53 Wash.App. 306, 313, 766 P.2d 1120, *review denied,* 112 Wash.2d 1015 (1989), and the State has not filed multiple charges. Here, multiple charges were filed. The trial court's reliance on RCW 9.94A.390(2)(c)(i) was error.

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[4] The "multiple victims" / "multiple incidents" aggravator is currently codified at RCW 9.94A.535(3)(d)(i).

See also State v. Modest, 88 Wash. App. 239, 252, 944 P.2d 417 (1997), *rev. denied*, 134 Wash.2d 1017 (1998) ("While there were multiple victims, the State filed charges for each victim. Consequently, the court may not rely on the multiple victims as an aggravating factor.").

This Court should vacate the special verdicts on counts IV, IX and XI in the 2008 case and remand for resentencing. As will be discussed below, the disturbance of the verdicts in the 2008 case also requires that the Court vacate the judgments in the 2007 and 2009 cases and remand for further proceedings.

The Trial Court Erred By Instructing the Jury that It Must Be Unanimous in Order to Answer "No" to the Questions Posed in the Special Verdict Forms.[5] This Error Was Not Harmless Beyond a Reasonable Doubt.

Read Together, Instructions No. 43 and 45 Misstated the Law.

Bedilion's jury had to be unanimous in order to answer "yes" on the special verdict forms. However, the reverse was not true—the jury did not have to be unanimous to answer "no." Instead, if *any one* of the jurors had a reasonable doubt regarding the special verdict, then the jury was required to answer "no" on the special verdict forms.

The outcome of this claim of error is controlled by the Washington Supreme Court's recent decision in *State v. Bashaw*, 169 Wash.2d 133, 234 P.3d 195 (2010), which in turn relied on the Court's 2003 decision in *State v. Goldberg,* 149 Wash.2d 888, 72 P.3d 1083 (2003). In *Bashaw*, the defendant was accused of

[5] Bedilion's trial counsel did not object to the instructions at issue here. The Washington Supreme Court is currently considering in two cases whether "*Bashaw*" error is manifest constitutional error which can be raised for the first time on appeal: *State v. Nunez*, 160 Wash. App. 150, 248 P.3d 103, *rev. granted*, 172 Wash.2d 1004 (2011), and *State v. Ryan*, 160 Wash. App. 944, 252 P.3d 895, *rev. granted*, 172 Wash.2d 1004 (2011).

engaging in multiple drug sales to an informant, each occurring within 1,000 feet of a school bus route stop. Regarding the enhancement, the trial court instructed the jury that "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Bashaw*, 169 Wash.2d at 139.

The Court framed and resolved the instructional issue as follows:

> [W]hen a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant's sentence beyond the maximum penalty allowed by the guidelines, must the jury's answer be unanimous in order to be final? We answered this question in *State v. Goldberg,* 149 Wash.2d 888, 72 P.3d 1083 (2003), and the answer is no. A nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt. . .

Bashaw, 169 Wash.2d at 145 (footnote omitted).

The Court noted that this rule serves a number of important values:

> First, we have previously noted that "[a] second trial exacts a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of defendants due to the emotional and financial strain of successive defenses." *State v. Labanowski,* 117 Wash.2d 405, 420, 816 P.2d 26 (1991). The costs and burdens of a new trial, even if limited

> to the determination of a special finding, are substantial. We have also recognized a defendant's "'valued right' to have the charges resolved by a particular tribunal." *State v. Wright,* 165 Wash.2d 783, 792-93, 203 P.3d 1027 (2009) (internal quotation marks omitted) (quoting *Arizona v. Washington,* 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Bashaw, 169 Wash.2d at 146-47. The Court concluded:

> [T]he jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, *see Goldberg,* 149 Wash.2d at 893, 72 P.3d 1083, it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wash.2d at 147.

Jury Instruction No. 43 failed to give Bedilion's jury *any* direction on how to go about answering the questions posed in the special verdict forms. However, Jury Instruction No. 45 stated that "each of you must agree for you to return a verdict." CP 281. When Instructions No. 43 and 45 are read together, the only possible interpretation is that the jury was told that it must be unanimous in order to answer *either* "yes" *or* "no" on the special verdict forms.

What is beyond debate is that the two instructions failed to clearly communicate the correct law to the jury—that if *even a single juror* had a reasonable doubt, then the answer to the special verdict question must be "no."

Even if there were any ambiguity in the instructions, "[t]he standard for clarity in a jury instruction is higher than for a statute." *State v. LeFaber*, 128 Wash.2d 896, 902, 913 P.2d 369 (1996), *overruled on other grounds in State v. O'Hara*, 167 Wash.2d 91, 217 P.3d 756 (2009). While a court may resolve ambiguous wording in a statute by applying rules of statutory construction, "a jury lacks such interpretive tools and thus requires a manifestly clear instruction." *LeFaber*, 128 Wash.2d at 902. Accordingly, when jury instructions are ambiguous, the reviewing court cannot assume that the jury interpreted the instructions correctly. *State v. McLoyd*, 87 Wash. App. 66, 71, 939 P.2d 1255 (1997), *aff'd sub. nom. State v. Studd*, 137 Wash.2d 533, 973 P.2d 1049 (1999), citing *Sandstrom v. Montana*, 442 U.S. 510 (1979); *LeFaber*, 128 Wash.2d at 902-03 ("Although a juror could read instruction 20 to arrive at the proper law, the offending sentence lacks any grammatical signal compelling

that interpretation over the alternative, conflicting, and erroneous reading.").

State v. Campbell, ___ Wash. App. ___, ___ P.3d ___, 2011 WL 3903428 (Sep. 6, 2011) is instructive. In *Campbell*, the jury was given the following instruction regarding the firearm enhancements alleged in that case:

> You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question you must answer "no."

Campbell, 2011 WL 3903428 at ¶ 5 n.2. While the instruction in *Campbell* is undeniably "better" than the instructions given here, the Court nevertheless concluded that the instruction was an erroneous statement of the law:

> Proper jury instructions for the special verdicts must similarly inform the jurors how to answer "yes" or "no," both individually and collectively. The instruction applicable to the special verdicts, Instruction 28, properly informed the jurors that they must be unanimous in order to answer "yes." However, by failing to distinguish between the deliberative process required for a collective "no" response and an individual "no" response, the instruction failed to inform the

> jury how to collectively answer "no" to the special verdicts. ***Because Instruction 28 did not inform the jury that anything short of a unanimous "yes" decision mandated a collective special verdict answer of "no," the instruction did not accurately inform the jurors of the law and, thus, was erroneous.***

Campbell, 2011 WL 3903428 at ¶ 13 (emphasis supplied).

Put simply, it cannot be seriously argued that there was not an error in the jury instructions regarding the special verdicts. The only remaining questions are whether the error was harmless, and what the appropriate remedy should be vis-à-vis the guilty pleas in the 2007 and 2009 cases (discussed below).

The Error Was Not Harmless Beyond a Reasonable Doubt.

In order for the instructional error in this case to be deemed harmless, this Court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Bashaw*, 169 Wash.2d at 147, quoting *State v. Brown,* 147 Wash.2d 330, 341, 58 P.3d 889 (2002), and *Neder v. United States,* 527 U.S. 1, 19 (1999). In *Bashaw*, despite the fact that there was evidence admitted at trial that all three drug transactions took place within 1,000 feet of a school bus route stop, and that two of the transactions

occurred within 100-150 feet of a school bus route stop, the Court nevertheless concluded that the instructional error was not harmless:

> ***The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction.*** *Goldberg* is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." *Id.* at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. ***We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.***

Bashaw, 169 Wash.2d at 147-48 (emphasis supplied).

This reasoning applies with equal force here. It is simply impossible to determine what the jury would have done with the special verdicts had it been properly instructed. Under *Goldberg* and *Bashaw* the instructional error which occurred here cannot be deemed harmless beyond a reasonable doubt. The proper remedy is to vacate the special verdicts and remand for re-sentencing.

As a Result of the Errors in the 2008 Case, Bedilion Is Entitled to Withdraw His Guilty Pleas in the 2007 and 2009 Cases.

Bedilion's circumstances with regard to his guilty pleas are somewhat unusual in that he first proceeded to trial on the 2008 case, and it was only *after* he was convicted at trial of five felonies plus three aggravating circumstances that he agreed to enter into a package deal in which he pled guilty to multiple felonies in the 2007 and 2009 cases and agreed to an exceptional sentence. It is quite clear from the record that the guilty pleas occurred *because* of the trial verdicts. Indeed, the trial prosecutor announced as much to the court just prior to entry of the guilty pleas:

> [W]e have reached a ***package resolution on all three of these cases***. . . Your honor, the parties have agreed in this case that pursuant to a finding of an exceptional sentence ***based on the fact that this case as [sic] a major economic offense as found by the jury*** in Counts 4, 9, and 11, in 08-1-01290-7, ***that this should have an exceptional sentence***.

8 RP 699 (emphasis supplied). Given that the guilty pleas flowed directly from the verdicts, it stands to reason that any disturbance of the trial verdicts necessarily renders the guilty pleas involuntary.

"Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." *In Re PRP of Bradley*, 165

Wash.2d 934, 939, 205 P.3d 123 (2009), quoting *In Re PRP of Isadore*, 151 Wash.2d 294, 297, 88 P.3d 390 (2004). Misinformation regarding the sentencing consequences of a guilty plea render the plea involuntary. *Bradley*, 165 Wash.2d at 939, citing *State v. Mendoza*, 157 Wash.2d 582, 590-91, 141 P.3d 149 (2006). Moreover, a defendant who has been misinformed about a sentencing consequence of his guilty plea need not demonstrate that the misinformation materially affected his decision to plead guilty. *Isadore,* 151 Wash.2d at 296; *see also Bradley*, 165 Wash.2d at 939 (citing *Isadore* for this proposition). "Therefore, misinformation about the length of a sentence renders a plea involuntary, even where the correct sentence may be less than the erroneous sentence included in the plea." *Bradley*, 165 Wash.2d at 939, citing *Mendoza*, 157 Wash.2d at 591.

In *Bradley*, the petitioner pled guilty to possession of cocaine, and to possession of cocaine with intent to deliver, based upon two separate incidents. He received concurrent sentences, with the simple possession charge carrying the lesser sentence. Consequently, the sentence on the simple possession charge did not

affect Bradley's total term of confinement. After his convictions became final, Bradley learned that his prior juvenile adjudications had been scored incorrectly in the simple possession case, resulting in an erroneously high standard range on that charge. Bradley then filed a personal restraint petition seeking to withdraw his guilty pleas in *both* cases. *Bradley*, 165 Wash.2d at 937-38.

Relying primarily on *Isadore* and *Mendoza*, the Washington Supreme Court concluded that Bradley's plea to the simple possession charge was involuntary because he had been misinformed of a direct consequence of his guilty plea when he was told the incorrect standard sentence range for that charge. *Bradley*, 165 Wash.2d at 939. The State argued that the range on the simple possession charge was not a direct consequence of the plea, because Bradley's sentences were concurrent and the sentence on the other drug charge carried a higher standard range than the simple possession charge. In other words, the State argued that the standard range on the simple possession was irrelevant because it had no effect on the total term of confinement. *Bradley*, 165 Wash.2d at 939-40.

The Court flatly rejected the State's argument:

> In *Isadore,* we held that a court will not speculate on the possible outcomes had the defendant been properly advised on the direct consequences of his plea. *Id.* at 302, 88 P.3d 390. Thus, we reject the State's invitation to consider the practical effect of Bradley's actions, as well as what the State itself might have done under other circumstances. This court cannot rewind the clock and put itself in the shoes of the prosecutor and the defendant as they entered into this plea agreement. As we observed in *Isadore:* "This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." *Id.* This exercise is tantamount to examining the practical effects of information on a plea under the materiality test we rejected in *Isadore.* Moreover, we have already held that the length of a sentence is a direct consequence of a plea. *Mendoza,* 157 Wash.2d at 590, 141 P.3d 49. We conclude that Bradley was not informed about a direct consequence of his plea, and the plea was therefore involuntary.

Bradley, 165 Wash.2d at 940-41.

The Court went on to hold that because the two pleas were part of an indivisible package deal, Bradley should be allowed to withdraw his guilty pleas in *both* cases. *Bradley*, 165 Wash.2d at 941-44; *see also State v. King*, 162 Wash. App. 234, 241, 253 P.3d 120 (2011) (" [I]f there is error on one count of a multi-count agreement, the entire plea agreement must be set aside upon request").

Bedilion was not misinformed regarding his offender score or his standard ranges. Rather, as discussed above, he was told that as a result of the jury's verdict on the 2008 case he was facing an exceptional sentence, when in fact the special verdicts were not supported by the evidence and were based on defective jury instructions. Put another way, Bedilion's guilty pleas were the result of misinformation regarding the sentencing consequences he faced as a result of his jury convictions. Under *Bradley*, *Isadore* and *Mendoza*, Bedilion's guilty pleas were involuntary.

This conclusion is further bolstered by the fact that the plea agreement was indivisible. A plea agreement is indivisible, and its terms must be enforced as a whole when "a defendant pleads guilty to multiple counts or charges at the same time, in the same proceedings, and in the same document." *State v. Turley*, 149 Wash.2d 395, 402, 69 P.3d 338 (2003):

> We agree that the plea agreement was one bargain or, as the defendant puts it, a "package deal." A plea agreement is essentially a contract made between a defendant and the State. Under normal contract principles, whether a contract is considered separable or indivisible is dependent upon the intent of the parties. When determining intent, we do not concern ourselves with unexpressed subjective intent, only objective manifestations of intent.

> The State argues that an evidentiary hearing is needed for the trial court to determine intent. Here, the record contains sufficient objective indications of intent from which we conclude the plea agreement was meant to be indivisible, without inquiry into the substance of the plea negotiations. ***Turley negotiated and pleaded to two charges contemporaneously. One document contained the plea to and conditions for both charges. The trial court accepted his plea to both charges at one hearing. In that hearing, the court advised Turley of the consequences of his plea, but did not separate these consequences out based on the individual charges. We hold that a trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding.*** Absent objective indications to the contrary in the agreement itself, we will not look behind the agreement to attempt to determine divisibility. Such a determination, after the fact, would not serve the plea negotiation process. When the defendant can show manifest injustice as to one count or charge in an indivisible agreement, the defendant may move to withdraw the plea agreement or have specific performance of the agreement.

Turley, 149 Wash.2d at 400.

Here, as noted above, the State specifically characterized the pleas as part of a "package resolution" of all three cases. 8 RP 699. The guilty plea forms in the 2007 and the 2009 cases each reference the other two cases before the trial court. CP 78-88, 317-325. The *Stipulation to Exceptional Sentences* listed and discussed all three

cause numbers. CP 284-287. The two guilty pleas and all three sentencings occurred in the same proceeding. 8 RP 698-725.

In short, under *Turley*, Bedilion's guilty pleas were manifestly part of an indivisible agreement. Accordingly, invalidation of all or part of the jury verdicts in the 2008 case renders the guilty pleas in the 2007 and 2009 cases involuntary. This Court should vacate the judgments in the 2007 and 2009 cases and remand to the Superior Court for further proceedings.

V. CONCLUSION

For the foregoing reasons, this Court should take the following actions:

Reverse the forgery convictions in counts IX and XI and dismiss those counts;

Reverse the second degree theft conviction in count II and dismiss that count;

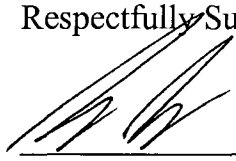
Vacate the special verdicts entered in conjunction with counts IV, IX and XI;

Remand the 2008 case for re-sentencing on the remaining counts; and

Vacate the judgments and guilty pleas in the 2007 and 2009 cases and remand for further proceedings.

DATED this 30th day of September, 2011.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on September 30, 2011, I served a copy of the attached brief on counsel for the State of Washington and on the appellant by causing the same to be mailed, first-class postage prepaid, to:

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